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Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to the European Union institutions

Addendum

Comments of the European Union institutions to the report of the Working Group*

* The document is circulated as received.

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Comments of the European Union institutions to the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to the European Union institutions

1. Despite reservations concerning the conceptual confusion entertained in the mandate and activities of the UN Working Group on Use of Mercenaries [a position expressed over the past years and to date e.g. EU intervention in the Interactive Dialogue with the Working Group at the 30th session and the forthcoming EU intervention at 33st session of the Human Rights Council], a visit of the Working Group on the Use Mercenaries to EU Institutions was facilitated by the European External Action Service and the Commission Services (hereinafter EU) from 25 to 28 April 2016. The Working Group representatives held separate meetings at the European Parliament. This addendum is submitted on behalf of the European Commission and European External Action Service (hereinafter EU).The EU attaches great importance to the UN Special Procedures and always stands ready to co-operate with the UN.

2. Firstly, the EU would like to thank the Working Group for taking on board some of the factual corrections it submitted to the Working Group's draft report.

3. However there are some additional comments made by the EU which we would like to have reflected on the record:

(a) Counter terrorism and the regulation of private military and security companies are matters that fall within Member State competence. Prosecution of related offences fall to Member States' courts.

(b) The Working Group is mandated to work on issues of mercenaries, as defined by international law. The EU has previously expressed concern about the lack of clarity, leading to confusion, as the mandate of the Working Group was extended to include Private Military and Private Security Companies (hereinafter PM/SCs). The EU therefore also has reservations that the Working Group has further engaged on the issue of "foreign fighters".

(c) The EU shares many of the concerns about the dangers of mercenary activity that have been expressed in the reports of the Working Group on the use of mercenaries. We recognise the dangers and the deeply negative impact that contemporary forms of mercenary activity can have on armed conflicts, and are concerned about any potential links between mercenaries and terrorist activities.

(d) The EU remains committed to raising standards in the legitimate global private security industry. The industry is a service provider to public and private sector clients and it supports diplomatic, commercial and humanitarian activity in complex environments around the world. In this regard the EU strongly supports the implementation of the UN Guiding Principles on Business and Human Rights, which also apply to private military and security companies. The upcoming European Union action plan on responsible business conduct will address the implementation of the Guiding Principles, including with regard to due diligence and access to remedy.

(e) The EU also remains committed towards mitigating the threat posed by foreign terrorist fighters, and is working with partners to address both the flow of individuals to conflict areas and their subsequent return. In addressing the threat posed by foreign terrorist fighters, primary attention is given to ensuring the safety and security of all

citizens whilst at all times ensuring a human rights compliant approach and adherence with wider rule of law.

(f) The EU is concerned that the Working Group did not meet with interlocutors in several Directorate Generals of the European Commission to enable it to have a full picture of how the EU engages with the issues addressed in the Working Group's report.

A. Foreign Fighters

4. The EU agrees with the Working Group's conclusions that ideological and religious incentives play a key role in the motivation of individuals to become foreign terrorist fighters. Therefore action to deepen collective understanding of what drives radicalisation and violent extremism is vital and is prioritised within existing EU activity. The EU is also committed to the exchange of information between EU stakeholders and wider partners to better enable targeted activity to address the threat posed by foreign terrorist fighters.

5. The report calls upon the EU in para. 14 to "encourage greater harmonization of response among its member States on the foundation of human rights, to eliminate the creation of options for foreign fighters to move their activity to countries with weaker regulations." The EU would like to refer to the proposal for a Directive on combating terrorism which will further harmonize the criminal justice response of EU Member States ensuring that there is a common standard of criminalisation of terrorist acts, including foreign terrorist fighters (though not necessarily all those considered as "foreign fighters").

6. The report also recommends in para. 14 to establish a common European Union-level approach for ensuring remedies to victims. The EU would like to refer to the proposed Directive on combating terrorism which will strengthen the rights of victims of terrorism, taking into account their special needs and building on the rights victims of crime under the EU Victim's Rights Directive.

7. The report expresses concerns about the lack of an impact assessment preceding the proposal for the Directive on combating terrorism. As the report rightly notes, most of the provisions in the proposed Directive are contained in existing EU instruments which have been regularly evaluated in the past. In addition, the EU would like to point out that under the Commission's Better Regulation guidelines no impact assessment is required when transposing international obligations where the margin of discretion is limited. The proposal for the Directive on combating terrorism aims to translate international obligations into EU law, namely the 2014 UN Security Council Resolution 2178 on Foreign Terrorist Fighters which is binding upon UN Member States and the Additional Protocol to the Council of Europe Convention on the prevention of terrorism signed by the EU in October 2015. It is worth recalling that the adoption of the latter was preceded by several rounds of experts' discussions throughout 2015 which included submissions from civil society representatives. The Commission has met with several civil society organisations in 2016 to discuss the proposed Directive, and EU institutions participated in a round-table meeting with Amnesty International, the International Commission of Jurists, the Open Society Justice Initiative and representatives of the International Committee of the Red Cross.

8. Concerning the impact on human rights of the proposal for the Directive on combating terrorism, the EU recalls that the EU legislator is bound by the Charter of Fundamental Rights of the EU. In addition, EU Member States are bound by the Charter in transposing the proposed Directive and in implementing and applying the offences defined by it.

B. Private Military and Private Security Companies

9. The EU supports all efforts to ensure compliance with international law by PM/SCs. The EU as an international organisation is a signatory to the Montreux Document which sets out international legal obligations and best practices for States when engaging PM/SCs during armed conflict. The EU is a member of the Group of Friends of the Montreux Document Forum's Chair (Switzerland and the International Committee of the Red Cross), and is actively engaged in the current discussions regarding the operationalisation of the certification, monitoring and complaints handling by the International Code of Conduct Association (ICoCA).

10. The EU institutions wish to point out that we do not contract private military companies. When contracting private security companies, tenders by the EU generally indicate that membership of the ICoC for PM/SCs is regarded as an advantage.

11. The EU including its military missions are normally not engaged in armed conflicts as combatants. Therefore international humanitarian law does not generally apply to our activities. This is not made clear in the Working Group's report.

12. The EU disagrees with the Working Group's conclusion that the differing legislation and policies on private military and security companies adopted by EU Member States result in "patchy and inconsistent regulation" at the EU level. There is no rationale for harmonisation if standards are merely different. In order for the Institutions to propose EU legislation, the various requirements of the Treaty on the Functioning of the European Union have to be met. This was thoroughly explained during the Brussels visit but not reflected in the report.

13. Regarding paragraph 81, the Council of the European Union decided in 2006 to exclude private security services, and other sectors, from the directive on services in the internal market in light of the specificities of the sector. The exclusion in Article 2(2)(k) of the Directive covers services such as surveillance of property and premises, protection of persons (bodyguards), security patrols or supervision of buildings. Services which are not "security services" as such, for instance the sale, delivery, installation and maintenance of technical security devices, are not covered by the exclusion. Services not covered by the Directive remain regulated by the provisions of the Treaty, in particular art. 49 and 56 TFEU on the right of establishment and the right to provide services.

14. In relation to paragraph 79, the EU wishes to point out that it maintains a database of excluded companies covering all sectors [see Article 105a - 108 of the Financial Regulation (EU, Euratom) No 966/2012), as amended by Regulation (EU, Euratom) 2015/1929 of 28 October 2015] Companies (which includes persons having powers of representation, decision making or control over them) who have been convicted of offences or grave professional misconduct including human rights violations can be excluded from participation in procurement procedures (Article 106 (1) FR). Due process, ensured by a newly established panel (Article 108(8) FR) is followed at all times. Under specific circumstances, an exclusion decision can be made public on the European Commission's website on the basis of Article 106 (16) FR.

15. The EU has participated actively to date in the UN Open-Ended Intergovernmental Working Group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies. The EU promotes a multi-faceted approach and believes that the full range of options should be considered which includes building on existing international frameworks and strengthening domestic laws.

16. The EU looks forward to the Interactive Dialogue at the 33st session of the Human Rights Council in September 2016.